

**THIS OPINION WAS NOT WRITTEN FOR PUBLICATION**

The opinion in support of the decision being entered today  
(1) was not written for publication in a law journal and  
(2) is not binding precedent of the Board.

Paper No. 28

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte NIKOLAI I. TANKOVICH

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Appeal No. 98-2234  
Control No. 90/004,334<sup>1</sup>

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HEARD: Dec. 9, 1998

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Before McCandlish, Senior Administrative Patent Judge,  
MEISTER and ABRAMS, Administrative Patent Judges.

MEISTER, Administrative Patent Judge.

***DECISION ON APPEAL***

Nikolai I. Tankovich (the appellant) appeals from the  
final rejection of claims 1-7, the only claims present in the  
application.

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<sup>1</sup> Reexamination proceeding for U.S. Patent No. 5,165,418  
issued November 24, 1992, to Nikolai I. Tankovich, and based  
on application 07/844,786, filed March 2, 1992. Reexamination  
request filed August 15, 1996.

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We REVERSE.

The reference relied on by the examiner is:  
Zenit, a Soviet Union brochure describing a laser scarifier,  
1990.

Claims 1-6 stand rejected under 35 U.S.C. § 102(b) as  
being anticipated by Zenit.

Claim 7 stands rejected under 35 U.S.C. § 103(a) as being  
unpatentable over Zenit.

The examiner's rejections are explained on pages 2-4 of  
the final rejection (Paper No. 14).

#### **OPINION**

The pivotal issue before us for consideration is whether  
Zenit was disseminated or distributed to the public prior to  
March 2, 1992,<sup>2</sup> the filing date of the application that

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<sup>2</sup> The printed publication provision of 35 U.S.C. § 102 was designed to prevent withdrawal by an inventor, as the subject matter of a patent, of that which was already in possession of the public. A document is a "printed publication" within the meaning of § 102 upon a satisfactory showing that such document has been disseminated or otherwise made available to the extent that those of ordinary skill in the art, by exercising reasonable diligence, can locate it and recognize and comprehend therefrom the essentials of the claimed invention without need of further research or experimentation. *In re Wyer*, 655 F.2d 221, 226, 210 USPQ 790, 794 (CCPA 1981)

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matured into Patent No. 5,165,418 (which is the subject of the instant re-examination proceeding). In an effort to establish that Zenit was in fact disseminated or distributed to the public prior to March 2, 1992, the requester submitted declarations by Troitski, Zoubov, Lobachev and Boudnik. The examiner found that the statements in the declarations were sufficient to "prove that the Zenit brochure was indeed printed and distributed to the public prior to March 2, 1991" (final rejection, page 3).

We will not support the examiner's position. As the court stated in **Carella v. Starlight Archery Pro Line Co.**, 804 F.2d 135, 138, 231 USPQ 644, 646 (Fed. Cir. 1986):

Although in some circumstances unsupported oral testimony can be sufficient to prove prior knowledge or use, it must be regarded with suspicion and subjected to close scrutiny. [Citations omitted.]

Furthermore, the credibility of such testimony must be established by clear and convincing evidence.<sup>3</sup> **See In re Sneed**, 710 F.2d 1544, 1549, 218 USPQ 385, 388 (Fed. Cir. 1983)

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<sup>3</sup> A requirement of proof by clear and convincing evidence imposes a heavier burden than that imposed by requiring proof by a preponderance of the evidence, but a somewhat lighter burden than that imposed by requiring proof beyond a reasonable doubt. **Price v. Symsek**, 988 F.2d 1187, 1191, 26 USPQ2d 1031, 1034 (Fed. Cir. 1993).

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and ***In re Reuter***, 651 F.2d 751, 758, 210 USPQ 249, 255 (CCPA 1981).

Here, the declaration by Troitski states:

5. Beginning in late 1990, several laser perforators were made and went on sale. Five Hundred (500) brochures were printed and distributed to the public, and in particular to physicians and medical institutes. A true and correct copy of the brochure is attached as Exhibit "B" to this Declaration. The brochure is titled "Laser Perforator."

6. Exhibit "B" was printed on November 19, 1990. It was distributed beginning shortly thereafter, and at least as early as the end of 1990.

It is unclear, however, whether the distribution referred to in paragraph 6 is the same as the distribution referred to in paragraph 5. In other words, while paragraph 5 states that the distribution was to the "public," paragraph 6 makes no reference whatsoever as to whom the distribution "at least as early as the end of 1990" was made. Insofar as the statement appearing in paragraph 6 is concerned, the distribution may well have been to someone other than the "public" (e.g., the employees of Zenit). In light of this ambiguity, we do not believe that the declaration by Troitski rises to the level of convincing evidence.

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We also observe that Troitski executed his declaration five and one-half years after the act of distribution "beginning shortly thereafter, and at least as early as the end of 1990." Inasmuch as there are no corroborating documents, it appears these statements were made from the declarant's memory of events. However, the substantial lapse of time between execution of the declaration and the seemingly innocuous act of distribution, detracts from the credibility of the declarant. **See Reuter**, 651 F.2d at 759, 210 USPQ at 256.

We have carefully reviewed the declarations by Zoubov, Lobachev and Boudnik (which are all substantially identical), but find nothing therein which would overcome the deficiencies that we have noted above with respect to the declaration by Troitski. In fact, these declarations are even more deficient than that of Troitski inasmuch as it is not even clear as to whether the "people" and "approximately 100-150 scientists and medical doctors" referred to therein were members of the public, as distinguished from employees.

When considering these declarations as a whole, we find that they fail to establish by clear and convincing evidence

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that Zenit was distributed or disseminated to the public prior to the "critical date" of March 2, 1992. This being the case, Zenit is not a printed publication within the meaning of 35 U.S.C. § 102 and may not be properly relied on as a reference. Accordingly,

the rejections of claims 1-6 under 35 U.S.C. §§ 102(b) and 103 based on Zenit as a reference are reversed.

***REVERSED***

Harrison E. McCandlish, Senior )  
Administrative Patent Judge )  
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PATENT	James M. Meister	) BOARD OF
	Administrative Patent Judge	) APPEALS AND
		) INTERFERENCES
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	Neal E. Abrams	)
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